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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1089

BATES BLOCK, et al.,

Petitioners,

v.

COMPAGNIE NATIONALE AIR FRANCE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY TO MEMORANDUM SUBMITTED BY THE SOLICITOR GENERAL AS *AMICUS CURIAE*

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This brief is submitted in reply to the memorandum submitted by the Solicitor General.

The Solicitor General states "in the government's view, the case does not present an issue of such recurring significance as to require plenary consideration by this Court," citing the fact that "there are no other reported decisions dealing with this precise problem," and suggesting that the recent Special Agreement among airlines raising the limit to $75,000 renders the issue moot.[1]

[1] Solicitor General's Brief, page 3.

The issue raised by the petition is significant. A large and growing segment of international flying is comprised of charters. Statistics released six days after the filing of the petition for certiorari, show that in 1967 charter flying constituted 17 per cent of all transatlantic air passenger travel. From April through September, 1967, 556,814 charter passengers crossed the Atlantic, an increase of approximately twenty-one per cent over the preceding year.[2] Nothing indicates the explosive growth of charter flying will cease.

It is true that no reported decision deals with this precise problem.[3] The issue has never before been raised. Its importance, however is not measured by how many times it has been dealt with. Until this consolidated action involving sixty-two deaths plaintiffs have not been able to raise the question because the effort has been too great for their resources. Now the work has been done; the issue is of growing significance. It should be resolved with that finality which only this Court can impart.

Furthermore, the recent Special Agreement among airlines providing a $75,000 limitation, relied on by the Solicitor General, does not render the question of inclusion of charters within the Warsaw Convention moot. Before the Special Agreement can even apply, it must first be deter-

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[2] Release, CAB-68-9, 382-6031, dated February 12, 1968. Transatlantic charter traffic has grown from 6.5 per cent in 1958 to 17.0 per cent in 1967, a 260 per cent growth in 10 years.

[3] The issue existed but remained unexplored in several cases cited in respondent's brief in opposition to this petition. (*Demanes* v. *Flying Tiger Line, Inc.*, 10 Avi. 17,611 (N. D. Calif. 1967); *Glassman* v. *Flying Tiger Line, Inc.*, 9 Avi. Cas. 18,295 (N. D. Calif. 1966); *Warren* v. *Flying Tiger Line, Inc.*, 234 F. Supp. 223 (S. D. Calif. 1964), *rev'd on other grounds*, 352 F. 2d 494 (9th Cir. 1965); *Mertens* v. *Flying Tiger Line, Inc.*, 35 F.R.D. 196 (S.D.N.Y. 1963), *aff'd*, 341 F. 2d 851 (2d Cir.) *cert. denied*, 382 U. S. 816 (1965), *Flying Tiger Line* v. *United States*, 170 F. Supp. 422 (Ct. Claims 1959). Respondent's brief, pages 11-12.)

mined that the Convention itself governs.[4] The Agreement, therefore, perpetuates the question.

The issue presented by the petition, therefore, is of great and grave importance not only to the families of the 62 decedents herein, whose rights to fair damages may be destroyed by this archaic treaty, but also to the many passengers in the future who, if the Convention covers charter flights, will be damaged by it.

Furthermore, notwithstanding the facile ratification of the Solicitor General, the decision of the Court of Appeals is wrong, and plainly so. As pointed out in our petition the Court of Appeals had to abandon well-accepted tenets

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[4] The air carriers' agreement to abide by the $75,000 limitation was entered into under Article 22(1) of the Warsaw Convention. A typical tariff reveals that the new limitation has as its basis the Convention:

"RULE 18: LIMITATION OF LIABILITY

(D)(1)(a) The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28th, 1955. However, in accordance with Article 22(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol, which, according to the Contract of Carriage, includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place (i) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs." Passenger Rules Tariff No. RR-3

of treaty construction and resort to concepts of French civil law to include charters in a convention whose drafters intended not to do so.

Unlike its active participation in *Alitalia-Linee Aeree Italiane, S.p.A.* v. *Lisi*, No. 70, also involving the Warsaw Convention and recently decided by this Court, the International Air Transport Association (IATA) has not been heard from here.[5] But reports to its member airlines, particularly by its Legal Committee, might serve as a brief *amicus curiae*, in favor of plenary consideration by this Court. IATA has continuously cautioned its airlines on the "gaps" or "ambiguities" of the Convention concerning charters and it, or its predecessor, has urged them, from the time of the Convention to virtually the present day, to give charter relationships the form and appearance of individual transportation, in an artificial attempt to bring charter relationships within the Convention's scope.[6]

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[5] On May 20, 1968, this Court granted leave to IATA to file a brief *amicus curiae*, in *Lisi*, on Alitalia's motion for a rehearing. IATA also filed briefs, *amicus curiae*, in *Lisi*, on the petition for a writ of certiorari therein, and on the merits.

[6] See, most recently the 1966 IATA Legal Committee Report urging the issuance of special tickets to charter passengers, IATA Bulletin No. 34, 1966, p. 82. See also the 1932 IATA Questionnaire, 17 IATA Inf. Bull. 42 (Hague 1932) discussed in the petition for a writ of certiorari pp. 24-26. See also ICAO Documents 7921-LC/143-1, p. 65, and 7921-LC/142-2, p. 69, contained in SJX 14 and reporting IATA reports and recommendations in 1957 and 1960.

CONCLUSION

This important question, under this important treaty merits consideration by this Court. The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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